Immigration and Labor/Employment Law Consequences of Health Care Mergers and Acquisitions

By Greg Siskind, Siskind Susser PC and Thomas N. Shorter, Godfrey & Kahn SC

Health care industry mergers and acquisitions continue at a strong pace; Irving Levin Associates noted 346 deals were announced in the first quarter of 2015, a 109% increase as compared to the first quarter of 2014. Health care organizations, which include hospitals, long term care facilities, home health care agencies, hospices, and physician practices, are complicated and highly regulated entities that encompass a large volume and broad composition of human resources. Surprisingly, during a transaction, and notably the due diligence process, the legal components of immigration and labor/employment often receive little attention. This article offers insights into key immigration and labor/employment areas to include in the due diligence process.

Immigration Consequences

Generally speaking, two immigration issues need to be addressed in the merger context. First, employees who are foreign nationals may find their visa eligibility affected by
the deal as well as their pending applications (such as green card filings) adversely impacted by the transaction. Second, employers are required to maintain I-9 and E-Verify employment verification records documenting their employees’ identification and authorization to work in the United States. Compliance with I-9 rules needs to be considered before the closing of the deal.

The consequences of ignoring these issues can be severe. Employees may find themselves out of legal status following a transaction because their visas are valid only to work for an employer that no longer exists. Employers in turn could face lawsuits from employees for failing to exercise due care in handling their visa matters. Furthermore, employers who fail to maintain their employees’ legal status also could be in violation of a growing number of state immigration laws, whose penalties may include the revocation of a business license. Buyers who simply choose to assume liability for the seller’s I-9s may find themselves regretting the decision when they are targeted for an audit by Immigration and Customs Enforcement. And companies risk front-page news coverage if immigration violations are found.

There is no “one-size-fits-all” approach to handling immigration issues in a merger or acquisition. Rather, various questions affecting immigration options must be considered including:

- How is the deal structured? Is it a merger or spin-off where employees will have a new employer with a different taxpayer identification number? Is it a stock purchase? Is it an asset acquisition where no liabilities are being assumed (or where just immigration liabilities are assumed)? Or a successor in interest where liabilities are being assumed?

- What are the timing considerations? Is there time to file new immigration petitions for affected employees? Are employees going to suffer adverse consequences as a result of the timing? Is it possible for the seller to retain the employees until the necessary transfer filings can be completed? Can filings be deferred until after the closing without a penalty or risk? Should petition amendments be filed, which involve fewer costs, but cannot request an extension of time for the worker, or should completely new petitions be filed?

- For I-9 forms and E-Verify filings, is the documentation of the selling entity being assumed by the buyer? If so, does the convenience outweigh the risks associated with assuming liability for the seller’s potentially sloppy recordkeeping?

- A buyer should ensure that the due diligence request addresses immigration issues (something that is often left out). A key request for the seller on the due diligence list is to identify all foreign nationals in any status other than permanent residency or citizenship. An analysis should be conducted on an employee-by-employee basis to determine the specific immigration strategy for that employee.

The particular strategy for each employee will depend on the status under which the employee is working.

**H-1B Visas**

One of the most common work visas used by America’s employers is the H-1B visa. This is a non-immigrant visa for “specialty occupations” that generally means professional workers with at least a bachelor’s degree or the equivalent. H-1B employers need to make a number of attestations to the Department of Labor and United States Citizenship and Immigration Services (USCIS) regarding wages and working conditions.

If an employee’s work location, duties, and salary are unaffected by the transaction, then the employer may benefit from a provision in the Immigration and Nationality Act applicable to corporate restructuring where the new employer is a successor in interest assuming the interests and obligations of the prior employer. In such cases, the successor employer need not file a new H-1B application. Instead, the employer would add a memorandum to the H-1B public access file maintained by the employer containing the following:

- A list of each affected H-1B employee including the related Labor Condition Application (LCA) by number and certification date;
- A description of the new employing entity’s actual wage system applicable to those workers;
- The Federal Employer Identification Number (FEIN) of the successor; and
- A statement that the successor is assuming the predecessor’s obligations and liabilities associated with the Department of Labor’s LCA filed as part of the worker’s H-1B application.

Note that this memorandum must be placed in the public access files contemporaneously with the closing of the deal or filing new LCAs may be required, something that is significantly more burdensome. A successor employer not comfortable making representations about a willingness to assume the predecessor employer’s obligations would need to file new LCAs and I-129 petitions for H1-B status. New LCAs and I-129 petitions also may need to be filed if there are changes in an employee’s duties, work location, or job requirements. Such filings should take place prior to closing, but from a practical standpoint, USCIS has allowed filings shortly after closing. Of course, there are no guarantees USCIS will make this allowance so as a best practice filing beforehand is recommended.

Successor employers also should check to see if the transaction will result in a change in the percentage of H-1B employees that will trigger “dependency” requirements. For employers with more than a certain percentage of H-1Bs who are paid less than $60,000 per year, additional recruiting requirements apply as well.
as restrictions on hiring H-1Bs before and after layoffs. Employees being acquired from a company that has been deemed a dependent employer also may be worth further scrutiny by the successor since it may be a result of prior H-1B violations.

Another issue that comes up more frequently for health care employers than others is the applicability of the H-1B cap. Many academic medical centers and nonprofit facilities are exempt from the annual quota of 85,000 H-1B visas. If the successor acquiring employees from such facilities is subject to the H-1B cap, then the employees could face a serious problem. USCIS generally takes the position that the question of cap exemption won’t arise until the next H-1B petition is filed. That’s helpful, but only puts off an issue that eventually must be addressed. Successor employers can sometimes absorb the predecessor employer as a nonprofit subsidiary and in such cases, cap exemption status may be retained; however, this requires careful coordination with tax counsel.

Physicians who train on J-1 visas and who have obtained a waiver based on working in a shortage area are required to work in that shortage area on an H-1B visa. There are more than 50 different state and federal J-1 waiver programs, many of which have rules that require the original sponsoring agency to be notified when there are changes in employment. In such cases, the particular rules of the state or federal agency should be consulted. Also, if a new H-1B must be filed on behalf of a doctor as a result of a corporate transaction, the physician may need to demonstrate that she continues to work in an under-served area, is still under a contractual obligation to work for the balance of three years remaining, and that there are extenuating circumstances justifying the change in employer. Generally, if the work location remains the same and the prevailing wage continues to be met, USCIS will approve the change.

TN Visas
TN visas for Mexicans and Canadians are largely tied to two main issues—what is the nationality of the applicant and is the person coming to the United States to work in an occupation that is listed in the North American Free Trade Agreement (NAFTA). In successor-in-interest situations, no action should be required by an employer. When an employee seeks an extension in the United States with USCIS or travels and seeks to reenter at a port of entry or seeks a visa at a consulate, the applicant should provide documentation regarding the new employer.

F-1 Visas
Student visa holders are normally entitled to “optional practical training”—or OPT—which permits them to remain employed in the United States for 12 months after completing their studies. While less common for physicians, students receiving degrees in allied health and other professional fields are frequently hired by health care employers. Generally, transactions won’t affect these workers except that those receiving degrees in certain science, technology, engineering, and math fields can qualify for an additional 17 months of work authorization if their employers use the E-Verify system. If the successor employer is not using E-Verify, these OPT employees may lose their authorization to work.

J-1 Visas
Many teaching hospitals have residents and fellows who are working on J-1 visas. The J-1 visas are sponsored by the Educational Commission on Foreign Medical Graduates (ECFMG), not the teaching hospitals, so a corporate change does not have a direct impact on the J-1. ECFMG does request host hospitals to notify the organization of significant changes including major corporate transactions since the J-1’s Student and Exchange Visitor Program (SEVIS) electronic record with Immigration and Customs Enforcement may be affected.

Permanent Residency Petitions
Most permanent residency applications involve multiple steps and filings with the Department of Labor and USCIS. The Department of Labor’s longstanding position is that if after an acquisition, a new employer remains the worker’s employer and assumes all of the past employer’s obligations, the new employer would qualify as a successor in interest and an LCA would survive.

The ability to continue processing the I-140 application for permanent residency with USCIS became easier in 2009 when USCIS issued a memorandum setting out a process for employers to follow in successor-in-interest situations. Employers need not show that all assets and liabilities have been assumed. Instead, USCIS looks to whether the job is the same, whether the successor has established eligibility for the requested visa, and whether the successor has detailed the nature of the transfer of rights, obligations, and ownership of the prior entity. If the three tests are met, USCIS will find a valid successor-in-interest relationship. For applicants who already have filed an adjustment of status application that has been pending six months or longer, the applicant only needs to show that the position is the same or similar to the one originally approved.

E-9s
Successors in interest have the option of assuming the prior employer’s Form I-9s. The alternative is for an employer to have every employee of the company prepare a new I-9 form. Employers assuming prior I-9s should audit them as part of due diligence to determine if adequate records were kept. If there is not time to conduct a thorough audit prior to closing,
the successor should conduct such an audit at the earliest possible time afterwards.

**Labor/Employment Law Consequences**

Labor/employment law issues are another often overlooked aspect of health care mergers and acquisitions that can have far-reaching consequences. A primary step in the due diligence process is to review all pertinent employment-related documents. While this may seem overwhelming, a recommended starting point is the human resource binders and employee handbooks.

The information provided below, while not exhaustive, is a representation of areas to be carefully reviewed as part of a merger or acquisition. Each of these cautionary items can result in drastic financial ramifications if not addressed during the due diligence process.

**In review of the employment documents:**

1. Identify if there are separate employee handbooks for hourly and salaried employees and then assess the similarities and differences.
2. Identify if a gift or bonus is distributed; review the written agreement and method or formula of calculation.
3. If a holiday bonus is given out, determine if it is discretionary, and if a claim for additional compensation exists.
4. Determine if there are any outstanding employment claims, including Occupational Safety & Health Administration (OSHA) violations or claims, wage and hour claims, or employment discrimination claims.
5. Pre-employment testing is a highly regulated area of human resources. Thoroughly review any pre-employment testing policies and procedures.
6. Closely assess if an employee has job protection during the orientation period.
7. If an involuntary termination policy exists, how does it affect accrued vacation time?
8. Review the layoff and recall policy, and the number of employees on layoff status during the entire merger/acquisition process.
9. If there is a policy for personal leave of absence, identify the number of employees on leave. A discussion should occur regarding the buyer’s obligation to employ any “inactive” employees.
10. Assess if a time clock policy exists, and how rounding an employee’s time is to occur when punching in or out. Review the federal law 29 C.F.R. 785.48(b), as well as any state law that may assess an exposure to a wage claim, particularly class based wage claims.
11. Assess any Educational Reimbursement policy that may be in place and the number of employees being provided tuition reimbursement.

**Analyze any union and Collective Bargaining Agreements (CBAs) to address how succession will occur**

Within the union and collective bargaining realm, it is important to understand the National Labor Relations Act (NLRA) of 1935. This is the basic statute regulating labor relations for private employers. It covers collective bargaining and union relations by providing employees three fundamental rights:

1. the right to organize;
2. the right to bargain collectively through chosen representatives; and
3. the right to engage in converted activities such as strikes and picketing.

To guarantee these rights, employers may not “restrain, coerce, or interfere” with an employee’s right to participate in organizational activities. Employers who base employment decisions on an employee’s participation or non-participation in protected activities are discriminating against the employee.

The NLRA also makes it unlawful to discharge or otherwise discriminate against an employee because he filed charges or has given testimony in an NLRA hearing. In 1974, the NLRA was amended to cover nonprofit hospitals and to establish special collective bargaining procedures in the health care field.

Two noteworthy cases relevant to mergers/acquisitions are Golden State Bottling Co. Inc. v. NLRB, and M&G Polymers USA, LLC v. Tackett. In Golden State Bottling Co. Inc. v. NLRB, the Supreme Court found a successor company jointly and severally liable with the seller for back pay to an employee whose discharge was found to be an unfair labor practice. The Court found the successor company had knowledge during the merger/acquisition process of the wrongdoing, which was not remediated. In the case of M&G Polymers USA, LLC v. Tackett, the Supreme Court addressed the interpretation of CBAs that included post-retirement welfare benefits, such as retiree health or life insurance benefits. A class of retired employees sued the current owner of the plant where they formerly worked when it announced, after the CBAs expired, that the retirees would have to begin contributing to the cost of their health benefits. The Sixth Circuit found the agreements indicated intent to vest lifetime contribution-free benefits and affirmed an injunction in the retirees’ favor. The Supreme Court held, however, that the Sixth Circuit’s approach was inconsistent with “ordinary principals of contract law,” which apply to CBAs.

Another area that health care organizations should keep in mind during a merger/acquisition is any social media policies that are in place. Social media has changed the speed and impact of union activities. Many employers maintain policies that expressly or impliedly prohibit online discussion of wages, benefits, and other terms and conditions of employment. The NLRB’s position, however, is that social media is merely a newer (and more effective) version of the “water cooler.” For that reason, policies that prohibit online discussion of wages, benefits, or other terms and conditions of employment are likely to be held unlawful by the NLRB.

As part of due diligence, be certain to review all union activity history as well as grievance history and collective bargaining to determine what liabilities may exist.

**Carefully identify any wage and hour violations and potential overtime compensation violations**

In cases involving the Fair Labor Standards Act (FLSA), the majority of back wages recovered have been for overtime violations while the breakdown of cases with minimum wage or
Supreme Court ruling in Young v. United Parcel Service, Inc., and Wiggins v. Spector Freight decisions. By contrast, in by the seller’s employment
ability for damages caused
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Purchasers have been bound
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Assess the likelihood of harassment,
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or other pending lawsuits
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decisions. By contrast, in
Wiggins v. Spector Freight
System, Inc., a purchaser was
found not liable for any claims a class
of plaintiffs may have had against their
prior employer where there was no evidence
of claims of employment discrimination at the time of the
purchaser’s acquisition.

The potential for lawsuits related to pregnancy discrimination
another area that should be monitored by health care
organizations as part of due diligence. Pregnancy discrimination
is not confined to current employees, and can begin with
job applicants and the hiring process in general. The Pregnancy
Discrimination Act (PDA) specifically protects pregnant appli-
cants from discrimination. Since fiscal year 2011, EEOC has
filed over 45 lawsuits involving pregnancy discrimination. In
September 2015, the EEOC filed suit against Your Health Team,
L.L.C. for violating federal law by firing a female home health aide
due to her pregnancy.

Health care employers in particular, which have a predomin-
nately female workforce, should take note of the recent
Supreme Court ruling in Young v. United Parcel Service, Inc., which
found there was enough evidence to show that United Parcel Service’s (UPS’s) policies imposed a significant burden on the
plaintiff and may have been discriminatory. The plaintiff
was told that under UPS policy, she did not qualify for the
company’s “light duty” accommodation. Subsequently, she
was put on unpaid leave until the end of her pregnancy, which
resulted in the loss of her medical benefits. In its decision, the
Court focused on the assertion that other UPS employees had
received different treatment.

During the due diligence process, thoroughly review
whether there are any pending lawsuits related to harassment,
discrimination, or other employment-related claims. In addition,
confirm that all settlement payments have been paid by the
seller pursuant to its agreements.

Workforce Reduction: Worker Adjustment and Retraining Noti-
fication Act (WARN) of 1989

The WARN Act requires employers with 100 or more employees
working at least 4,000 aggregate straight-time hours per week,
not including new or low-hour employees, to provide
60-days written notice in advance of any “plant closings”
or “mass layoffs.” The WARN Act defines a “plant closing”
as a permanent or temporary shutdown of a single site of
employment, or of a facility or operating unit at a single
site, that results in an employment loss of 50 or more full-time employees.

An offer of employment from the buyer to all employees of
the seller will negate any potential claim of WARN Act liability on the part of
the seller. A review of the purchase agreement should
explain the buyer’s offer of position, wage levels,
and benefit structure. If the buyer does not offer employ-
ment to all the seller’s employees, including “inactive employees,” a
more specific WARN Act analysis needs to be conducted. If the number approaches 50 or more employees, the buyer will be responsible to provide
notice.

Review all pension and health claims to be sure contributions
are up to date

Employee benefit plans are a part of every employment setting.
Given complications of administering employee benefit plans
in compliance with the Employee Retirement Income Security
Act of 1974 (ERISA), it is an area fraught with risk. Accord-
ingly, it is important for the acquiring entity to conduct a thor-
ough due diligence evaluation of the plans. Specific aspects of
each plan should be reviewed to assess any potential financial
liability post transaction. These aspects include: any pending
or threatened claims, qualified plan matters, special consider-
ations to define benefits, and multiemployer plans. In addition,
COBRA compliance should be carefully reviewed, specific
to retiree health, transaction-related compensation, and the
ability to modify benefits post-closing.

Additionally, executive compensation issues, golden para-
chute payments, outstanding flexible spending accounts, group
liability premiums, and multiemployer plan withdrawal liability
should be reviewed. One cautionary case is Einhorn v. M.L.
Ruberton Const. Co., which required the asset purchasers to

Cultural
due diligence
should be as rigorous and
systematic as that done for the
financial, legal, and operational
components of any merger/acquisition.
satisfy the seller’s delinquent contributions owed to a pension fund. The ruling in this case reflected the strong federal interest in protecting pension funds and their beneficiaries.

ERISA “sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans.”30

According to the Department of Labor, “ERISA requires plans to provide participants with plan information including important information about plan features and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; and gives participants the right to sue for benefits and breaches of fiduciary duty.”31

All ERISA reportable events as well notifications and notices to employees and government agencies regarding any pension or health claim changes should be reviewed.

Workforce Culture
Cultural due diligence should be as rigorous and systematic as that done for the financial, legal, and operational components of any merger/acquisition.

Frequently, if leaders fail to address needed cultural changes, success in attaining the strategic benefits of the merger/acquisition will be limited. Even when two organizations have similar cultures, numerous issues related to employee values and beliefs, operations and processes, and organizational behaviors are inevitable.

One of the biggest challenges in retaining staff and employees after a merger is reconciling differences in pay and benefits. Personnel turnover is much more likely to occur when employees feel as though the merger is hurting them financially.

In addition, staff retention and compensation complications can have major impacts on the overriding success of any health care merger. Critical ingredients to any merger are the creative and collaborative melding of culture, chemistry, and communication. With an emphasis on these components, the reconciliation of compensation and benefit differences is more likely to occur.

Conclusion
The volume of health care transactions continues to grow, as does the necessity of incorporating immigration and labor/employment considerations into the due diligence process. The number of individuals involved in this highly labor intensive, highly skilled, and highly regulated arena increases the challenges for successful outcomes to the merger and acquisition process. The human resource impact on the success of health care mergers and acquisitions is likely to be more apparent than in other industries. Thus, the legal areas of immigration and labor/employment need to be more thoroughly incorporated into the due diligence process. To help work through these issues, Appendix A provides a checklist to incorporate into the governance, financial, and operational requests at the outset of any health care merger, acquisition, or other major transaction.

Appendix A: Immigration and Labor/Employment Due Diligence checklist:
A sample due diligence query to include with the governance, financial, and operational requests at the outset of any health care merger, acquisition, or other major transaction.

1. Provide a list of all employees who are not U.S. lawful permanent residents or citizens. The list should break down employees by visa category, work authorization expiration date, number of years in a particular visa category, the employee’s work site, and whether any non-immigrant visa applications or extension petitions or permanent residency petitions are pending or promised. Also note any changes in job duties, location, or salary that will occur as a result of the transaction.
2. For all employees listed above, please provide a copy of all documents relating to such employees’ immigration status including, but not limited to:
   a. Non-immigrant visa applications and extension petitions;
   b. Employment authorization documents;
   c. I-9 forms;
   d. Labor certification and immigrant visa applications and supporting documentation;
   e. Approval notices and correspondence with any government agencies;
   f. I-94 forms and passport visa stamps;
   g. documentation for the employees’ spouses and minor children; and
   h. H-1B public access files.
3. Provide copies of all correspondence with the Social Security Administration relating to the “mismatch” of Social Security numbers for any employees.
4. Provide copies of any correspondence with agencies of the Department of Homeland Security, Labor Department, Justice Department, or State Department regarding compliance with the country’s immigration laws.
5. I-9s—Provide a copy of all I-9s required to be kept by the employer, and a list of all employees of the company employed since 1986. Counsel will select a number of employees from the list and request their I-9s be provided.
6. Review the employee handbooks for discrepancies and similarities between hourly and salaried employees.
7. Analyze employee handbooks and human resource manuals to identify the discrepancies and similarities between policy and function, not limited to, but particularly in the areas of:
   a. Gift and bonus distribution,
   b. OSHA violations or claims,
   c. Pre-employment testing,
   d. Job protection during orientation,
   e. Involuntary termination policy,
   f. Layoff and recall policy,
   g. Personal Leave of Absence,
   h. Time clock policy, and
   i. Educational reimbursement policy.
9. Review wage and hour violations, as well as overtime compensation violations.
10. Assess all harassment, discrimination, and other pending lawsuits.
11. Review all pension funds to be sure all contributions are up to date.
12. Ensure there are no delinquent health claims.
13. As a merger/acquisition processes, assess the likelihood of any workforce reductions, if any are expected, carefully review the guidelines of the WARN act.

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Endnotes

4. 20 C.F.R. § 655.730(j).
5. 20 C.F.R. § 655.736(a).
6. Immigration and Nationality Act, as amended, at § 214(g)(5).
7. Immigration and Nationality Act § 214(i).
10. Memorandum to USCIS Field Leadership from Donald Neufeld, USCIS Acting Associate Director, Field Operations, Aug. 6, 2009.
11. Id.
18. Id. at 933.
22. 583 F.2d 882 (6th Cir. 1978).
29. 632 F.3d 89 (3d Cir. 2011).
31. Id.

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